	11-1901-19208-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY

Steve Sviggum, Commissioner, Department of Labor and Industry, State of Minnesota, Complainant, v. Brent Anderson Associates, Inc., Respondent.	**ORDER REGARDING COMPLAINANT'S MOTION FOR SUMMARY DISPOSITION**

The above-entitled matter is pending before Administrative Law Judge Barbara L. Neilson pursuant to a Notice of and Order for Pre-Hearing Conference issued on February 14, 2008, and the Complainant's motion for summary disposition. Julie A. Leppink, Assistant Attorney General, appeared on behalf of the Complainant, the Commissioner of the Department of Labor and Industry. John W. Quarnstrom, Attorney at Law, Twin Cities Roofing Contractors Association, appeared on behalf of the Respondent, Brent Anderson Associates, Inc.

Based upon all of the files, records and proceedings herein, and for the reasons set forth in the accompanying Memorandum,

IT IS HEREBY ORDERED as follows:

(1) The Complainant's Motion for Summary Disposition is **GRANTED** as to the applicability of the standards set forth in 29 C.F.R. § 1926.501(b)(1) and (13) to the type of work being performed by Respondent's employees at the time of the inspection on September 22, 2005; the Respondent's failure to comply with those standards; the classification of the violations as serious; and the Respondent's selective enforcement and estoppel claims.

(2) The Complainant's Motion for Summary Disposition is **DENIED** as to the appropriateness of the proposed sanction, and that issue shall proceed to hearing on October 7, 2008, commencing at 9:30 a.m. in the courtrooms of the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota 55101.

Dated: September 18, 2008

s/Barbara L. Neilson

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BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

I. Background

Based upon the motion papers and related materials and affidavits filed by the parties, it appears that the facts in this case are as follows. On September 22, 2005, the Minnesota Occupational Safety and Health Division (MN OSHA) conducted a safety and health inspection of Respondent's work site located at 10 - 26th Street East, in Minneapolis, Minnesota.[1] MN OSHA Investigator Jerry Sykora conducted the inspection after observing that employees were installing paving stones on an unguarded work surface.[2]

The building under construction was part commercial and part residential. The ground floor of the building contained a parking garage and retail spaces, and the upper floors were condominiums.[3] The area where the employees were working was approximately four to five feet wide and 16 to 18 feet from the ground.[4] The work area did not have guardrails or safety nets and the employees were not wearing personal fall protection.[5] Investigator Sykora photographed three employees working on the work surface, one of whom was kneeling with his feet at the edge of the structure. In the photographs, the safety monitor (an employee wearing a yellow vest) can be seen standing in a window overlooking the work area.[6] At the conclusion of the inspection, Investigator Sykora informed the foreman on the jobsite that citations would be proposed by MN OSHA because employees were installing paving stones on a balcony without fall protection and were not engaged in roofing activity.[7]

During a second closing conference held by telephone on September 23, 2005, safety contacts for Respondent asserted that the employees were engaged in roofing activities and should be allowed to use a monitoring system of fall protection. They described the paving stones as "roof ballast." They asserted that they had performed a similar activity at the Walker Art Center and were allowed by OSHA Consultation to use a monitor on that project. MN OSHA representatives responded by stating that the work area at issue here was only 4-5 feet wide and employees were always near the edge, making the use of a monitor impractical. The Inspector agreed to discuss the photos with a supervisor and OSHA Consultation before issuing citations. The Inspector subsequently showed the photographs he had taken of the project to a supervisor, another safety investigator, and a Principle Safety Investigator in OSHA Consultation, and all agreed that the activity being performed did not appear to be roofing work.[8] The Inspector concluded that the employees were working from a balcony and were not working on a "roof" or engaging in "roofing work" as described in OSHA regulations.

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[1] Affidavit of OSHA Investigator Jerome Sykora, Ex. A.
[2] *Id*. at 2. The paving stones were approximately 12 x 6 inches and 2 inches thick. *Id*. at 6.
[3] *Id*.
[4] *Id*. at 2, 6, 8-10.
[5] *Id*.
[6] *Id*. at 6, 8-10.
[7] *Id*. at 2-3, 6.
[8] *Id*. at 3.

On October 4, 2005, as a result of the inspection, a grouped citation was issued to Respondent asserting a violation of 29 C.F.R. §§ 1926.501(b) and 1926.501(b)(13).[9] These OSHA standards require workers engaged in residential construction activities six feet or more above lower levels, or working on a walking/working surface with an unprotected side or edge six feet or more above lower levels, to be protected from falling by guardrail systems, safety net systems, or personal fall arrest systems. The materials submitted by the Complainant indicate that, in determining the classification and penalty amount for the grouped citations, Investigator Sykora referred to the penalty chapter of the MN OSHA Field Compliance Manual (FCM).[10] The grouped citation was given a severity factor of "E" on a scale of A through F. The "E" severity factor was based on a fall hazard from a height of 16 to 18 feet.[11] MN OSHA's Citation Rating Guide rates violations of 29 C.F.R. 1926.501 as an "E" when the fall exposure is more than 15 feet and less than 20 feet.[12] MN OSHA classifies all citations with severity factors of C through F as serious violations.[13] A serious classification is appropriate when a violation "creates a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such a place of employment, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation."[14]

Investigator Sykora assigned the grouped citation a probability factor of "8" on a scale of 1 through 10, with 10 being the most probable.[15] The probability factor assesses the likelihood of an injury occurring as the result of a violation and is based on criteria in MN OSHA's FCM including employee exposure, proximity to the hazard, duration of the hazard, work conditions and additional instances.[16] Investigator Sykora assigned the citations a "2" for employee exposure and proximity to the hazard because two employees were exposed to the hazard and working in the hazard zone.[17] He assigned the citations a "2" for duration of the hazard because employees were exposed to fall hazards for more than half of the work day.[18] He assigned a "2" for work conditions because the narrow width of the balcony increased the likelihood that employees would fall.[19] He assigned a "0" for additional instances.[20]

Investigator Sykora assessed an unadjusted penalty of $4,000.00 for the grouped citations based on MN OSHA's penalty chart.[21] He then gave Respondent a penalty credit of 50%, which adjusted the final penalty assessed to $2,000.00. Based upon the

[9] Ex. 1.
[10] Ex. 3.
[11] Sykora Aff. Ex. A at 7.
[12] Ex. 3 Appendix at VI-A-20.
[13] Ex. 3 at VI-1, VI-2.
[14] Minn. Stat. § 182.651, subd. 12.
[15] Sykora Aff. Ex. A at 7.
[16] Ex. 3 at VI-3-7.
[17] Sykora Aff. Ex. A at 7; Ex. 3 at VI-4 – VI-5.
[18] Sykora Aff. Ex. A at 7; Ex. 3 at VI-5 – VI-6.
[19] Sykora Aff. Ex. A at 6-7; Ex. 3 at VI-4 – VI-6.
[20] Sykora Aff. Ex. A at 7; Ex. 3 at VI-6 – VI-7.
[21] Ex. 3 at VI-24.

Inspection Narrative, it appears that this credit reflected a reduction of 20% for the size of the company, 20% for good faith "based on safety and health program," and 10% for no prior related history.[22] The citation noted that the violation was corrected during inspection because employees were removed from the work area at issue.[23]

Respondent filed a Notice of Contest contesting the citations, the classification of the citations as serious, and the penalty.[24] Respondent disputes that the cited standards apply, and alternatively asserts the affirmative defenses of selective enforcement and equitable estoppel.

II. Standard for Summary Disposition

The Complainant seeks summary disposition in this matter. Summary disposition is the administrative equivalent of summary judgment.[25] The entry of summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.[26] The Office of Administrative Hearings has generally followed the summary judgment standards developed in the courts in considering motions for summary disposition of contested case matters.[27]

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. A genuine issue is one that is not sham or frivolous. To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.[28] It is not sufficient for the non-moving party to rest on mere averments or denials; it must present specific facts demonstrating a genuine issue for trial.[29] If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.[30]

III. Discussion

Employers in Minnesota are required to comply with the occupational safety and health standards and rules promulgated under the Minnesota Occupational Safety and Health Act.[31] The Act defines "employer" as "a person who employs one or more employees [including] any person who has the power to hire, fire, transfer, or who acts

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[22] Sykora Aff. Ex. A at 2 and 7.
[23] Ex. 1; Sykora Aff. at 6.
[24] Ex. 2.
[25] *Pietsch v. Mn. Bd. of Chiropractic Examiners*, 683 N.W.2d 303, 306 (Minn. 2004).
[26] *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwgie v. Witco Chemical Corp*., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. 1400.5500 K; Minn.R.Civ.P. 56.03.
[27] *See* Minn. R. 1400.6600.
[28] *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986).
[29] Minn. R. Civ. P., 56.05.
[30] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986).
[31] Minn. Stat. § 182.653, subd. 3.

in the interest of, or a representative of, an employer . . . ."[32] "Employee" is defined as "any person suffered or permitted to work by an employer, including any person acting directly or indirectly in the interest of or as a representative of, an employer . . . ."[33]

Pursuant to Minn. R. 5205.0010, subd. 6, the Department of Labor and Industry adopted by reference Part 1926 of Volume 29 of the U.S. Code of Federal Regulations. It is clear that Respondent's employees were engaged in construction work (defined in 29 C.F.R. § 1910.12(a) as "work for construction, alteration, and/or repair, including painting and decorating") at the time of the inspection. Accordingly, it is evident that Respondent must comply with the applicable construction standards set forth in 29 C.F.R. Part 1926.

In order to establish a violation of a specific standard under the Act, the Commissioner must prove by a preponderance of the evidence that: (1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) an employee had access or was exposed to the violative condition; and (4) the employer knew, or with the exercise of reasonable diligence, could have known of the violative condition.[34]

As discussed in more detail below, the dispute in this case focuses on which standard should be applied to Respondent's employees and whether the Complainant may appropriately seek to apply 29 C.F.R. § 1926.501(b)(1) and (13) to Respondent.

A. The Applicable Standard

The Complainant cited the Respondent for violating 29 C.F.R. §§ 1926.501(b)(1) and 1926.501(b)(13). These standards provide:

> 29 C.F.R. § 1926.501(b)(1). Unprotected sides and edges. Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.
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> 29 C.F.R. § 1926.501(b)(13). Residential construction. Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and

[32] Minn. Stat. § 182.651, subd. 7.
[33] Minn. Stat. § 182.651, subd. 9.
[34] *Dun-Par Engineered Form Co.,* 12 OSHC 1962, 1986-87 OSHD ¶ 27,651 (1986), *rev'd on other grounds*, 843 F.3d 1135 (8th Cir. 1988); *Gilles & Cotting, Inc.,* 3 OSHC 2002, 1975-76 OSHD ¶ 20,448 (1976).

> implement a fall protection plan which meets the requirements of paragraph (k) of Sec. 1926.502.

Respondent argues that the Commissioner has inaccurately characterized the work surface in question and has relied upon the wrong standards. Respondent maintains that its employees were not working on a balcony, as the Commissioner contends, but instead were engaged in roofing work on a low slope roof[35] less than 50 feet in width. Respondent thus maintains that a different OSHA standard, 29 C.F.R. § 1926.501(b)(10), applied to its work and asserts that it was, in fact, in compliance with that standard. Section 1926.501(b)(10) permits the use of a "safety monitoring system" alone on roofs that are 50 feet or less in width, rather than the guardrails, safety nets, personal fall arrest systems, and other fall protection systems required under section 1926(b)(1) and (13):

> Roofing work on Low-slope roofs. Except as otherwise provided in paragraph (b) of this section, each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system. Or, on roofs 50-feet (15.25 m) or less in width (see Appendix A to subpart M of this part), the use of a safety monitoring system alone [i.e. without the warning line system] is permitted.

A "safety monitoring system" is one in which "a competent person is responsible for recognizing and warning employees of fall hazards."[36]

Respondent asserts that its employees were applying roofing materials at the time of the inspection, the work that was being performed was outlined in the roofing specifications provided for the job site, and the two-inch pavers that were being installed by its employees are commonly used in the roofing industry. As further evidence that the working surface at issue in this case should not be considered a balcony but rather a "roof," Respondent emphasized that part of the building under construction was immediately below the working surface.[37] Respondent submitted a letter from Robert Danley, the Business Manager of Roofers Union Local No. 96, stating that Respondent's employees were applying roofing materials and conducting roofing work at the time of the inspection, and noting that OSHA Consultation observed installation by Respondent of "the same roofing materials in identical roof areas" on the Walker Art Center Expansion Project in 2004-05 and "agreed that the use of a safety monitor was

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[35] A low-slope roof is defined as a "roof having a slope less than or equal to 4 in 12 (vertical to horizontal)." 29 C.F.R. § 1926.500(b).

[36] 29 C.F.R. § 1926.500(b).

[37] The term "balcony" is not defined in the OSHA regulations. Respondent points out that the dictionary definition of the term is a "platform projecting from the wall of a building." Respondent's Memo at 1, citing *Webster's New Dictionary* (1997).

in total compliance with OSHA fall protection standards." Because "the parties clearly differ as to whether the working surface in question can be defined as a roof,"[38] Respondent further contends that there is a material fact at issue that precludes the entry of summary disposition.

As a threshold matter, the Administrative Law Judge concludes that the question of whether the work surface involved in this case constituted a "roof" as defined in the OSHA regulations is a question of law, not fact.[39] The parties agree that Respondent's employees were installing paving stones on the work surface as described in the inspection report and pictured in the accompanying photographs. The primary issue presented in this case is a legal issue: whether the standards cited by MN OSHA set forth in 29 C.F.R. § 1926.501(b)(1) and (13) apply, or whether the standard urged by Respondent set forth in 29 C.F.R. § 1926.501(b)(10) applies.

The Administrative Law Judge further concludes that the Complainant has demonstrated that the standards set forth in 29 C.F.R. § 1926.501(b)(1) and (13) do, in fact, apply to the type of work being performed by Respondent's employees at the time of the inspection, and Respondent's submission is not sufficient to raise a genuine issue of material fact as to that issue. The OSHA regulations define "roof" as "the exterior surface *on the top of a building*," and clarify that the term "does not include floors or formwork which, because a building has not been completed, temporarily become the top surface of a building."[40] Here, it is evident that the employees were not working on the top surface of the building. Instead, they were working on a surface inset into the side of the building. Based on the photographs, it appears that the roof on top of that portion of the building was located approximately two floors above. Several OSHA cases have held that one or both of the standards cited by MN OSHA apply to employees working without fall protection on balconies of residential construction projects.[41] Based on the plain language of the OSHA regulations and case law interpreting those regulations, it is evident that the working surface did not constitute a "roof" within the meaning of the OSHA regulations and Respondent's employees were

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[38] Respondent's Memo at 2.

[39] *State v. Wiltgen*, 737 N.W.2d 561, 566 (Minn. 2007) ("The application of law and constitutional principles to undisputed facts is a question of law"); *Bendorf v. Commissioner of Pub. Safety*, 712 N.W.2d 221, 223 (Minn. App. 2006), *aff'd*, 727 N.W.2d 410 (Minn.2007).

[40] 29 C.F.R. § 1926.500(b) (emphasis added).

[41] *See, e.g., Secretary of Labor v. Aquatek Systems, Inc*., 2006 WL 741751 (O.S.H.R.C.) (applying 29 C.F.R. § 1926.501(b)(13) to employees waterproofing balconies, but finding that federal OSHA failed to establish a violation of that regulation because the employer took reasonable measures to prevent the occurrence of fall protection violations); *Secretary of Labor v. Lacerte Builders, Inc.*, 2003 WL 21355485 (O.S.H.R.C.A.L.J.) (finding a violation of 29 C.F.R. § 1926.501(b)(1) where employees were engaging in exterior work on a third floor balcony with no fall protection); *Secretary of Labor v. CWJ Contracting, Inc.,* 2003 WL 22232009 (O.S.H.R.C.A.L.J.) (finding a violation of 29 C.F.R. § 1926.501(b)(13) where a superintendent failed to use fall protection while standing on a second floor undecked balcony); and *Secretary of Labor v. Ranch Masonry, Inc.,* 2002 WL 1180994 (O.S.H.R.C.A.L.J.) (finding a violation of 29 C.F.R. § 1926.501(b)(1) where employees were performing stucco plastering operations from the fourth floor balcony without any of the types of fall protection listed in the regulation). Copies of these decisions are attached to MN OSHA's Memorandum of Law in Support of Motion as Exs. 5-8.

not performing "roofing work."[42] Because the Administrative Law Judge concludes that the employees were not working on a "roof," the provisions of 29 C.F.R. § 1926.501(b)(10) permitting the use of a safety monitor when roofing work is performed on low-slope roofs do not have any applicability here.

B. Existence of a Violation

The Complainant has also demonstrated that there was a failure to comply with the cited standards, the Respondent's employees had access to the violative conditions, and the Respondent knew or should have known of the violative conditions. Respondent does not dispute that it merely used a safety monitor at the worksite, and that no guardrails, safety nets, warning lines or other types of personal fall protection were used. In addition, it is undisputed that at least two of Respondent's employees were working on the balcony and that Respondent's foreman was present on the jobsite at the time. Accordingly, the Complainant has shown that it is entitled to summary disposition with respect to Respondent's violation of 29 C.F.R. §§ 1926.501(b)(1) and 1926.501(b)(13).

C. Affirmative Defenses

In its Answer, Respondent raised defenses of equitable estoppel/detrimental reliance and selective enforcement. In its Memorandum in Opposition to the Motion, Respondent argues that summary disposition should not be granted for the following reasons:

> Respondent intends to present testimony that previous OSHA inspections of substantially similar jobs have been performed and the safety monitor fall protection system was allowed. No new rules have been issued or announced in the interim, and the respondent should be allowed to rely upon previous determinations in OSHA inspections. These issues cannot be thoroughly reviewed without a hearing. Summary Disposition is, therefore, inappropriate.[43]

In connection with its Memorandum, Respondent submitted an Affidavit of Brock B. Hamre, the Safety Director for the Twin Cities Roofing Contractors Association, and a copy of a February 23, 2006, letter to the Commissioner from Robert Danley, Business Manager for Local 96 of the United Union of Roofers, Waterproofers and Allied Workers. The Complainant did not provide any affidavits or other materials denying the accuracy of the assertions made by Mr. Hamre and Mr. Danley.

In his affidavit, Mr. Hamre indicated that he attended the informal conference regarding the citation at issue here on September 23, 2005, and provided roofing specifications for that job to Department representatives. He asserted that initially

[42] "Roofing work" is defined in OSHA regulations as "the hoisting, storage, application, and removal of roofing materials and equipment, including related insulation, sheet metal, and vapor barrier work, but not including the construction of the roof deck." 29 C.F.R. § 1926.500(b).
[43] Memorandum in Opposition at 4.

"Department personnel appeared to agree that roofing work was being performed" but, "[f]ollowing a private caucus, the Department personnel returned and took the position that the work in question was not being performed on a roof."[44] Mr. Hamre further stated in his affidavit that safety monitors had been allowed on other similar jobs, including the Walker Arts Center, and indicated that he has observed concrete pavers used as a roof ballast on numerous jobs in the Twin Cities.[45] Moreover, Mr. Hamre attested that he is personally familiar with other job sites where Department field personnel have determined that a working surface is a roof even when it is not the highest part of the building or has a roof or canopy over the top.[46] Finally, he indicated that he is "unaware of any law or regulation that would prohibit the use of a safety monitor fall protection system solely because of a working surface of 4-5 feet in width" and has "never experienced Department representatives taking that position."[47]

In his February 2006 letter, Mr. Danley indicated that the Union also wished to contest the citations issued to Respondent in this case. Mr. Danley argued that, if only the exterior surface of the top of a building can be considered a roof, "then any multi-level roofing project would be cited by OSHA . . . [even] those of fifty (50) feet or less in width where the standard specifically allows for the use of a safety monitoring system." He contended that the definition of "roofing work" would apply to the "balconies" on this project because roofing materials were being applied. Mr. Danley stated that the Respondent had "installed the same roofing materials in identical roof areas on the Walker Art Center Expansion Project in 2004-2005" and that, during that project, "OSHA Consultation was on site observing the application and agreed that the use of a safety monitor was in total compliance with OSHA fall protection standards." He indicated that "[t]he notion that Brent Anderson Associates, Inc. was not performing roofing work on these balconies contradicts OSHA's previous fall protection interpretation involving the same work in identical conditions." In addition, he stated that, during more than thirty years of roofing work, he had never seen roofing work interpreted as only that performed on the very top of a building. Finally, he indicated that the employees on the job "were well-informed of the fall hazards on this particular job and understood their responsibilities to the safety monitor assigned to control fall hazards."[48]

As a general rule, prosecutors have broad discretion as to whom to prosecute, and this prosecutorial discretion has been held to apply to OSHA cases brought by the Secretary of Labor.[49] To establish an affirmative defense of selective prosecution, there must be evidence of something more than mere selectivity:

> It is well settled that the conscious exercise of some selectivity in enforcement is not in itself a constitutional violation. Relief is available only if the decision to prosecute is shown to have been deliberately based

[44] Affidavit of Brock B. Hamre, ¶ 4.
[45] Hamre Aff. at ¶¶ 4-5.
[46] *Id*. at ¶¶ 9-10.
[47] *Id*. at ¶ 11.
[48] Feb. 23, 2006, Letter to Commissioner from Robert Danley, attached to Memorandum in Opposition.
[49] *Secretary v. Dekalb Forge Co.*, 1987 WL 89066 (O.S.H.R.C.) citing *Wayte v. United States*, 470 U.S. 598, 607-08 (1985); *see also* G.A. Beck, *Minnesota Administrative Procedure*, 2003, § 3.6.

> on an unjustifiable standard such as race or religion or other arbitrary classification . . . or was unreasonably initiated with the intent to punish the employer for his exercise of a legally protected right.[50]

Assuming that the assertions made by Mr. Hamre and Mr. Danley are true, they still are insufficient to create a genuine issue of material fact regarding whether MN OSHA engaged in improper selective enforcement. Respondent's allegations do not suggest that the citations were based on an unjustifiable standard such as race, religion, gender, or other arbitrary classification, or that they reflected an effort by MN OSHA to punish Respondent for the exercise of any rights. Accordingly, the Administrative Law Judge concludes that the Complainant is entitled to summary disposition with respect to Respondent's selective enforcement claim.

Respondent has also asserted equitable estoppel as an affirmative defense in this matter. The Minnesota courts have recognized that a government agency may be estopped if justice requires, but the doctrine is not freely applied.[51] Generally, in administrative cases, equitable estoppel can be asserted against the government only where fault or wrongful conduct is shown on the part of the agency, the claimant reasonably relied upon the representations made, the claimant will be harmed if estoppel is not allowed, and the equities of the case outweigh the public interest.[52] As discussed above, Respondent argues MN OSHA should be estopped from finding violations of 40 C.F.R. §§ 1926.501(b)(1) and 1923.501(b)(13) because the current interpretation is contrary to prior compliance interpretation involving similar work. In particular, Respondent asserts that, when its employees installed the same roofing materials in identical roof areas of the Walter Art Center Expansion Project in 2004-05, OSHA Consultation informed Respondent that the use of a safety monitor fully complied with OSHA fall protection standards.

In OSHA matters, it is well established that a statement or action by a compliance officer does not bind the Department in bringing a prosecution for a violation of an identified standard, and that the Department is not estopped from charging an employer with a violation simply because the violative condition was not cited during a prior inspection.[53] The decisions reached in these cases are consistent with the public

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[50] *Secretary of Labor v. Lunda Construction Co.*, 2003 WL 716980 (O.S.H.R.C.A.L.J.) (citations omitted); *see also Central Airlines, Inc. v. U.S.*, 138 F.3d 333 (8th Cir. 1998) (unequal application of agency regulations does not violate equal protection unless an element of intentional or purposeful discrimination is shown to be present); *Secretary of Labor v. Allstate Painting and Contracting Co*., 2000 WL 294523 (O.S.H.R.C.A.L.J.) (citation omitted). *U.S. v. Armstrong*, 517 U.S. 456 (1996); G. Beck, et al., *Minnesota Administrative Procedure*, § 3.6 (2003).

[51] *See, e.g., Brown v. Minnesota Dept. of Public Welfare*, 368 N.W.2d 906, 910 (Minn. 1985); *Mesaba Aviation v. County of Itasca,* 250 N.W.2d 877, 880 (Minn. 1977).

[52] *Brown v. Minnesota Department of Public Welfare*, 368 N.W.2d 906, 910 (Minn. 1985).

[53] *See, e.g., Secretary of Labor v. Seibel Modern Manufacturing and Welding Corp.,* 1991 WL 166592 (O.S.H.R.C.) (a failure by OSHA to issue a citation is not a decision that the employer was complying or a basis for the employer to infer that the condition was not hazardous); *Donovan v. Daniel Marr & Son Co.,* 763 F.2d 477 (1st Cir. 1985); *Columbian Artworks, Inc.,* 1981 OSHD ¶ 25,737 (1981); *Del-Cook Lumber Co.,* 6 OSHC 1362, 1978 OSHD ¶ 22,544 (1978); Findings of Fact, Conclusions and Recommendation in *Commissioner of Labor and Industry v. Industrial Container and Dumpbox Manufacturing, Inc*., OAH No. 8-1901-11220-2 (1997), at 17, Findings of Fact, Conclusions and Recommendation in *In the Matter of the*

interest since, if the Department was estopped from prosecuting violations due to previous misinformation provided by enforcement officers, regulated companies would have a right to continue an improper practice that places the health and safety of employees at risk. Respondent has not made an adequate showing that the equities in this case outweigh the public interest in safeguarding workers from fall hazards. In addition, Respondent has had an opportunity to contest the citation and make its arguments concerning the applicability of the cited standards in this contested case proceeding, and has not shown that it will be harmed if equitable estoppel is not applied. In addition, The Administrative Law Judge therefore concludes that Complainant is entitled to summary judgment with respect to Respondent's estoppel claim.

C. Classification of Violation and Reasonableness of Penalty

In its Notice of Contest, Respondent appealed the classification of each of the violations and the proposed penalties, in addition to the existence of the alleged violations.[54] Respondent did not directly challenge any particular aspect of the Complainant's penalty calculation in its response in opposition to the Department's Motion for Summary Disposition. The Complainant has demonstrated that assignment of a severity factor of E for a 16-18 feet fall hazard, and classification of the citations as "serious" was consistent with MN OSHA's Citation Rating Guide. Respondent did not dispute that a fall from a height of 16-18 feet would create a substantial probability of death or serious physical harm" under Minn. Stat. § 182.651.[55] Complainant is entitled to summary disposition concerning the classification of the violation as serious.

As discussed in more detail above, Respondent did argue in its Memorandum in Opposition to the Motion that the Department has not previously applied the cited standards to Respondent or other contractors engaging in similar work but rather has allowed them to treat balconies as roofs and use a safety monitor as fall protection. It also contended that OSHA Workplace Safety Consultation has previously determined that Respondent's use of a safety monitor when installing the same materials on identical areas of the Walker Arts Center Expansion Project in 2004-05 was in full compliance with OSHA fall protection standards**.** The Complainant did not provide any affidavits or other materials denying the accuracy of these assertions.

Minn. Stat. § 182.666, subd. 6, authorizes the Commissioner to assess fines for violations, "giving due consideration to the appropriateness of the fine with respect to the size of the business of the employer, the gravity of the violation, the good faith of the employer, and the history of previous violations." Moreover, where an

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Amended Administrative Penalty Order to Westling Manufacturing, Inc., OAH No. 2-2200-2299-2 (1998), at 18.

[54] Ex. 2 (Notice of Contest) at 2.

[55] "Serious violation" is defined in Minn. Stat. § 182.651, subd. 12, to mean "a violation of any standard, rule, or order other than a de minimis violation which is the proximate cause of the death of an employee. It also means a violation of any standard, rule, or order which creates a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such a place of employment, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation."

employer has received erroneous compliance information from a compliance officer in the past and the condition is subsequently found to violate a standard, OSHA cases have held that it is not appropriate to impose a significant sanction until the employer has had notice and an opportunity to correct the condition.[56] The allegations made by Mr. Hamre and Mr. Danley are sufficient to raise an issue of fact regarding whether it is appropriate to reduce the sanction imposed in this case. Accordingly, the Administrative Law Judge concludes that genuine issues of material fact remain for hearing with respect to the appropriateness of the sanction sought by Complainant, and summary judgment as to that issue must be denied.

IV. Conclusion

It is appropriate to grant the Complainant's motion for summary disposition in part and deny it in part. Respondent has failed to raise a genuine issue of material fact that would prevent the entry of summary disposition with respect to the existence of violations of 29 C.F.R. § 1926.501(b)(1) and (13), the classification of the violations, and its selective enforcement and estoppel claims. However, Respondent has demonstrated that genuine issues of material fact remain for hearing with respect to the appropriateness of the sanction sought by Complainant. The latter issue must proceed to hearing.

B. L. N.

[56] *See, e.g., Columbian Artworks, Inc.,* 1981 OSHD ¶ 25,737 (1981); *Del-Cook Lumber Co.,* 6 OSHC 1362, 1978 OSHD ¶ 22,544 (1978). *Accord:* Findings of Fact, Conclusions and Recommendation in *In the Matter of the Amended Administrative Penalty Order to Westling Manufacturing, Inc.*, OAH No. 2-2200-2299-2 (1998), at 19.